

No. 91411-7

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CONNIE POTTER and SUSAN PAULSELL,  
trustees of the Amended and Restated Fredrick O. Paulsell, Jr.  
Living Trust dated December 22, 2002,

Petitioners,

v.

JOSEPH MICHAEL GAFFNEY and JANE DOE GAFFNEY, his wife,  
and DORSEY WHITNEY, LLP, a Minnesota Limited Liability  
Partnership,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

The American Rule bars Plaintiffs/Petitioners' effort to recover in this legal malpractice dispute attorney fees and expenses they incurred litigating a separate, bitter trust dispute in which both original co-trustees were adjudicated to bear fault for their conduct as trustees. Simply put, the amounts the original co-trustees spent litigating their trust dispute are not a compensable form of damages under Washington law. Nor does Washington's narrow equitable indemnity exception to the American Rule, sometimes referred to as the ABC rule, apply to the undisputed facts of this case. The trial court correctly granted summary judgment dismissing Petitioners' claims.

Petitioners' principal argument on appeal is that this Court should rewrite substantially Washington's established law regarding recovery of attorney fees and expand the narrow equitable indemnity exception to the American Rule. Nothing in this case supports the Court's doing so. Indeed, to do so would reward Petitioners' own improper and overly litigious conduct.

Petitioners also attempt to resurrect on appeal a claim for breach of fiduciary duty and disgorgement of fees paid to Respondents. This effort should be rejected for three reasons. First, the claim was not argued below on summary judgment although Respondents' motion sought to dismiss all

claims. Moreover, the claim was not identified or discussed in Petitioners' Statement of Grounds for Direct Review. The claim was thus abandoned and cannot be resurrected in Petitioners' appeal brief. Second, the claim is barred by the statute of limitations. Third, the claim is based on the alleged breach of a duty that was not owed to Petitioners. The breach of fiduciary duty claim and request for disgorgement were properly subject to the trial court's summary judgment order.

Finally, Petitioners' failure to segregate damages is an independent reason all their claims were properly dismissed. In response to Respondents' summary judgment motion, Petitioners were obligated to provide evidence demonstrating the specific portion of their losses attributable to the allegedly wrongful conduct of Respondents as opposed to other causes. Respondents repeatedly pointed out the absence of such evidence. Petitioners never responded or even attempted to meet this burden. This failure separately warrants dismissal.

In sum, the Petitioners are not entitled to any damages in this case. The trial court was right to dismiss the action. This Court should affirm.

## **II. STATEMENT OF ISSUES**

1. Whether the American Rule precludes Petitioners Connie Potter and Susan Paulsell (the "Trustees") from shifting the litigation fees and expenses incurred in separate trust litigation, for which the parties to

that dispute already have been adjudicated to bear responsibility, onto Respondents Joseph Gaffney and Dorsey Whitney LLP (collectively, “Dorsey”) in this malpractice litigation.

2. Whether the findings in the trust litigation that the original co-trustees breached their fiduciary duties and that one trustee was over-litigious, along with the participation of each co-trustee in Dorsey’s prior work, bar application of the narrow ABC exception to the American Rule.

3. Whether the Trustees are precluded from asserting a breach of fiduciary duty claim to disgorge fees paid to Dorsey when (a) the Trustees failed to argue for disgorgement before the trial court or in their request for direct review, (b) Dorsey’s alleged breach took place in 2002 but the claim was not brought until 2012, well beyond the statutory limitations period, and (c) the duty allegedly breached was owed to Susan Paulsell in her individual capacity, but she is no longer a party here in that capacity.

4. Whether the Trustees failed to provide necessary evidence for segregating any specific portion of losses attributable to Dorsey as opposed to other causes, despite Dorsey’s repeated objections regarding the lack of such evidence on summary judgment.

### III. STATEMENT OF THE CASE

#### A. Factual background

Investment banker and venture capitalist Frederick Paulsell Jr. (“Fred Jr.”) married Petitioner Susan Paulsell (“Susan”) in 1998. CP 79, ¶ 4. In 1997, Fred Jr. established a revocable trust for the benefit of Fred Jr.’s children by a prior marriage (the “Paulsell children”). CP 78-79, ¶ 3. Fred Jr. designated his eldest son, Frederick Paulsell III (“Fred III”), as his successor trustee. *Id.* In April 2002, after about four years of marriage and without the assistance of legal counsel, Fred Jr. executed a one-page will leaving all his “material possessions” to Susan and directing that upon her death they should pass equally to the Paulsell children and Susan’s four children by a prior marriage (the “Hebenstreit children”). CP 79, ¶ 5. The will named Susan and Fred III as joint “trustees.” *Id.* The same year, Fred Jr. died. CP 29, ¶¶ 1-3.

As co-personal representatives of Fred Jr.’s estate, Susan and Fred III asked Dorsey to advise them with respect to the estate. CP 78-79. Recognizing that Fred Jr.’s 2002 will potentially created a number of complicated issues regarding, for example, how the marital deduction in federal taxation applied, whether the will revoked or amended the 1997 trust, and whether certain assets were trust assets or estate assets, Dorsey advised Susan and Fred III to enter into a Binding Non-judicial Dispute

Resolution Agreement (the “Agreement”). CP 79-80, ¶ 6. With input from Susan and Fred III, Dorsey drafted an Agreement establishing an Amended and Restated Trust (the “Trust”), which Fred III and Susan agreed reflected Fred Jr.’s expressed intent. *Id.*

The Agreement named Susan sole beneficiary during her life and allowed her to use Trust assets to maintain the lifestyle she enjoyed while married to Fred Jr. CP 106-07. Her lifestyle included, for example, ownership of five houses and membership in nine country clubs. CP 584, 588. Upon Susan’s death, any residual was to pass to the Paulsell and Hebenstreit children. CP 107. Susan and Fred III were designated as co-trustees of the newly established Trust. CP 108. All persons having an interest in Fred Jr.’s estate, i.e., the Paulsell and Hebenstreit children along with Susan and Fred III, signed the Agreement. CP 108-13.

Dorsey did not handle day-to-day administration of Fred Jr.’s estate or the Trust, was not involved in the accounting of the Trust, and was provided no Trust account statements or other accounting records. CP 81, ¶ 9. Dorsey’s work related to the Agreement and establishment of the Trust (in 2002) was complete by May 2007, when Dorsey sent the final invoice in that matter (for various incidental services) to the personal representatives of the estate. CP 196-98.

In September 2008, Fred III—concerned by Susan’s spending and his own lack of knowledge into the “inflows and outflows” of the Trust—contacted Dorsey. CP 83, ¶ 12, 200, 205. Susan and Fred III then engaged Dorsey again, to prepare an accounting and reconciliation for the Trust. CP 203, 208-09. Dorsey opened this new matter on October 7, 2008. CP 83, ¶ 12, 203. Fred III told Dorsey that he was concerned about Susan’s treatment of trust income as personal income and extensive distributions from the trust. CP 205. Handicapped by Susan providing only incomplete information, Dorsey was unable to account for nearly \$3 million in Trust funds. CP 84, ¶ 14, 810. Dorsey’s accounting showed that Susan had taken trust income as her own and made millions of dollars of withdrawals from the Trust. CP 214-21.

In September 2009, Fred III decided to freeze the Trust’s assets. CP 250, ¶ 10. Susan then filed a declaratory judgment action in Multnomah County, Oregon, regarding her management of the Trust (the “Oregon litigation”). *Id.*, ¶ 11. An interim trustee was appointed, and a professional fiduciary firm, Beagle, Burke, and Associates of Oregon, Inc. (“Beagle, Burke”) was hired to prepare a full audit. CP 641-42. Despite locating much of the missing \$3 million, the audit did not end the litigation. Fred III continued to dispute Susan’s spending, co-mingling of

funds, and gifts to the Hebenstreit children in preference to the Paulsell children. *See* CP 667-75, 678-94.

The Oregon litigation, to which Dorsey was not a party and in which no Dorsey lawyer testified, was resolved through a bench trial. CP 381 (lines 22-25), 804. The court ruled that Fred III had abdicated his duties and would be replaced as co-trustee by a professional fiduciary. CP 805, 811. The court stated that Fred III “ignored his duty of loyalty to the beneficiary of the trust” and “neither requested nor authored any yearly summaries regarding the income and expenditures of the trust until 2008.” CP 805, 809. In an Amended Memorandum of Decision addressing litigation fees and expenses, the court further ruled that in litigation and settlement negotiations, Fred III “compounded his already serious neglect of the trust in the years prior to 2008” by refusing to assess realistically “the discovery produced, the accounting performed by Beagle, Burke or the testimony presented at trial” and “inflated this dispute from something that could have been resolved with a joint accounting to a fully litigated dispute costing approximately one sixth the value of the trust.” CP 801. The court characterized Fred III’s performance as “lacking in even the basics necessary to fulfill his duties as trustee.” CP 802.

The court also described the ways in which Susan did not act “as a careful fiduciary,” including placing trust funds in her personal accounts,

keeping poor records, using trust accounts to pay her expenses directly, and failing to communicate with Fred III as co-trustee. CP 805. The court observed that this behavior was “remarkable, given the amount of money at issue and the fiduciary nature of her position as trustee . . . .” *Id.* Indeed, Susan neglected her fiduciary duties as co-trustee notwithstanding the fact she is a sophisticated financial advisor. CP 579-80. The court also found that due to her “insufficient” methods for administering and managing the Trust, Susan shared responsibility for the incomplete reconciliation prepared by Dorsey. CP 810. As to the work done by Dorsey, the court was making “no comment on the ethical issues or legal malpractice issues presented by some of the events and documents in evidence in th[e] case.” CP 808. The court limited Susan to a monthly distribution from the Trust of no more than \$47,000. CP 811.

**B. Proceedings below**

In March 2012, Susan and Connie Potter (a professional fiduciary designated as Fred III’s replacement) filed the present action, as co-trustees, against Dorsey. CP 1-8. Alleging legal malpractice and breach of fiduciary duty, the Trustees sued in King County Superior Court to recover attorney fees and related litigation expenses incurred by Susan, Fred III, and others in the Oregon litigation (fees that have been

reimbursed by the Trust), in addition to disgorgement of fees paid to Dorsey. CP 33-35, 243-44.

Dorsey moved for summary judgment on multiple grounds. In its briefing to the trial court, Dorsey argued that (1) the American Rule bars any award of litigation expenses and Washington’s narrow exception for equitable indemnification—also known as the “ABC Rule”—does not apply here, CP 59-65, 67-70; (2) the Trustees failed to provide evidence for segregating any damages for which Dorsey would be liable, CP 65-66; and (3) the Trustees failed to bring their claims within the applicable limitations period, CP 70-72. *See also* CP 546-52 (Dorsey’s Reply in Support of Motion for Summary Judgment).

After a hearing on the motion, *see* VRP (Feb. 6, 2015), the trial court granted summary judgment for Dorsey and dismissed all claims with prejudice. CP 556. The Trustees sought direct review in this Court. For the reasons discussed below, this Court should affirm the trial court’s grant of summary judgment in favor of Dorsey.

#### **IV. STANDARD OF REVIEW**

A summary judgment ruling is reviewed de novo. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). Summary judgment is proper “if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* On appeal from a

grant of summary judgment, a reviewing court “may affirm the trial court on any theory established in the pleadings” and argued below, regardless of which theories the trial court relied upon. *Id.*

## V. ARGUMENT

### A. The American Rule precludes an award of litigation expenses in this case.

The trial court’s grant of summary judgment was proper because the American Rule bars any award of attorney fees and other litigation expenses here. The American Rule is a longstanding check on the shifting of attorney fees and expenses. The rule is not, as the Trustees argue, limited to fees sought in the same lawsuit in which they are incurred.

Washington law recognizes only a narrow exception to the American Rule for fees incurred in litigation with a third party—called “equitable indemnity” or the “ABC Rule.” This exception does not apply, however, unless, *inter alia*, the defendant (i.e., the party from whom fees are sought) was the sole cause of the litigation, and the third party (i.e., the other party that was in litigation with the plaintiff) had no connection with the defendant’s disputed conduct. It is undisputed that neither of these required elements is satisfied here. Nor is there any reason to abandon these requirements and overrule more than 50 years of Washington case law, as the Trustees request. The requirements are appropriately applied in this case to prevent an award of fees where the parties seeking fees

substantially contributed to the events that caused the litigation at issue and the resulting expense. Under Washington law, the Trustees are not entitled to recover their litigation fees and expenses.

1. The American Rule broadly precludes an award of litigation expenses in the same or a subsequent lawsuit, absent a recognized exception.

The American Rule broadly precludes awarding litigation expenses in Washington. Under the rule, any “litigation expenses”—including attorney fees in particular—“are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity.” *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Washington has followed this rule “[s]ince pioneer days . . . .” *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 195, 390 P.2d 976 (1964). Washington courts are not alone in their long-standing adherence to the American Rule. The United States Supreme Court recently reiterated that the American Rule is a “bedrock principle” with “roots in our common law dating back at least to the 18th century . . . .” *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2164, 192 L. Ed. 208 (2015).

The policies behind the American Rule are fundamental and longstanding. They include avoiding “the time, expense, and difficulties of proof inherent in litigating . . . attorney’s fees,” *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L. Ed.

2d 475 (1967); leaving each person to decide how much to spend on his or her own legal representation, *see Oelrichs v. Spain*, 82 U.S. 211, 231, 21 L. Ed. 43 (1872); preventing the “danger of abuse” when third parties are expected to pay for litigation, *id.*; and deferring to legislative judgment regarding which particular circumstances warrant fee-shifting, *see Blue Sky Advocates v. State*, 107 Wn.2d 112, 121-22, 727 P.2d 644 (1986). Another purpose of the rule, as the Trustees point out, is to avoid penalizing a party “for merely defending or prosecuting a lawsuit.” Br. of Apps. at 20 (quoting *Fleishmann*, 386 U.S. at 718). The Trustees overlook that this is but *one* purpose of the rule, rather than the only purpose. *See* Br. of Apps. at 20-21.

As the various policies underlying the American Rule demonstrate, litigation fees and expenses are distinct from other forms of financial cost or injury. Litigation fees and expenses represent the amount a party opts to spend in resolving a dispute through formal, legal channels. *See Oelrichs*, 82 U.S. at 231. This is a subjective decision, with a heightened “danger of abuse” and risk of “animated and protracted” litigation if parties know they will be able to recover such expenses. *Id.* As a result, the American Rule leaves the decision to each party and precludes compensation for litigation fees and expenses. *See id.*

Based on all of the fundamental purposes of the American Rule, Washington courts have repeatedly clarified and emphasized that absent an exception, the rule precludes an award of fees and expenses “as *costs or damages*”. *City of Seattle v. McCready*, 131 Wn.2d 266, 273-75, 931 P.2d 156 (1997) (emphasis in original); *see also, e.g., Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 97, 285 P.3d 70 (2012) (noting attorney fees “are not available as either costs or damages”). The rule applies equally to fees from a separate litigation sought as damages. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123, 125, 330 P.3d 190 (2014) (noting rule covers “fees incurred in a separate litigation”); *Lovell v. House of the Good Shepherd*, 14 Wash. 211, 214-15, 44 P. 253 (1896) (noting fees “cannot be recovered in a separate action”). In sum, the American Rule broadly precludes any award of litigation fees and expenses (in the same suit, or a different suit) absent a recognized exception.

The Trustees argue nonetheless that the American Rule should be limited to fee and expense requests in the same litigation and should not preclude the recovery of fees and expenses in subsequent litigation. Washington case law, including the *Lovell* and *LK Operating* cases noted above, does not support the Trustees’ argument.

The distinction the Trustees would draw between fee awards in the same litigation versus separate litigation is illogical, because the American Rule would be useless if the Trustees were correct. A litigant often has discretion to choose between suing one party or multiple parties in a single litigation or separate litigations, and any litigant able to use the Trustees' proposed distinction could always file separate actions to circumvent the American Rule. As this Court recognized in *Lovell*, it "will not do to sustain a practice which will allow a party who successfully brings an action for the recovery of a legal right to bring a subsequent action to recover the expenses incident to the first case." 14 Wash. at 214. The decisive factor governing application of the American Rule has to be the basis for the claim for fees (i.e., a statute or contract provision), not the procedural context in which a litigant chooses to assert it.

Indeed, Washington recognizes certain substantive "exceptions" to the American Rule for awarding fees "as *damages*." *McCready*, 131 Wn.2d at 275 (emphasis in original). One such exception applies to claims for fees incurred in litigation with a "third person" in certain specified circumstances. *Id.* If the American Rule did not apply to subsequent litigation, as the Trustees suggest, there would be no need for an exception authorizing recovery of fees incurred in certain litigation with third parties.

Washington is not alone in its application of the American Rule to subsequent litigation. In numerous jurisdictions across the country, the American Rule is similarly applied to fees incurred in the same or in a separate lawsuit. *See, e.g., Taylor v. S. Pac. Transp. Co.*, 130 Ariz. 516, 523, 637 P.2d 726 (1981) (“It is the generally accepted rule that attorneys fees are not recoverable in either the same or subsequent suit . . . .”); *Collier v. MD-Indiv. Practice Ass’n, Inc.*, 327 Md. 1, 13, 607 A.2d 537 (1992) (noting that “for nearly 200 years” the American Rule has precluded recovery of litigation expenses “as consequential damages”); *Jacobsen v. Allstate Ins. Co.*, 351 Mont. 464, 469, 215 P.3d 649 (2009) (American Rule precludes award of fees from prior lawsuit absent exception); *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, 446 S.W.3d 14, 27 (Tex. Ct. App. 2013) (noting “attorney’s fees expended in litigation with third parties are not generally recoverable as damages”).

As in Washington, these jurisdictions require that any claim for third-party litigation fees and expenses fall within a narrow exception to the American Rule. *See, e.g., McQueen v. Jordan Pines Townhomes Owners Ass’n, Inc.*, 298 P.3d 666, 675 (Utah 2013) (noting “[r]ecovery of attorney fees as consequential damages is a narrow exception to the normal rule”); *Pederson v. Kennedy*, 128 Cal. App. 3d 976, 979-80, 180 Cal. Rptr. 740 (1982) (noting that award of fees “in a later lawsuit”

requires exception to the American Rule); *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 342 Wis.2d 29, 69, 816 N.W.2d 853 (2012) (noting “narrow exception” for fees incurred in “litigation with a third party”). This includes many out-of-state cases the Trustees cite on this issue. See Br. of Apps. at 23 n.2 (citing cases); see, e.g., *Ex parte Burnham, Klinefelter, Halsey, Jones & Cater, P.C.*, 674 So.2d 1287, 1290 (Ala. 1995) (discussing exception).

The Trustees rely heavily on a recent Ninth Circuit opinion, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015). See Br. of Apps. at 21. The *Microsoft* Court decided the unremarkable but irrelevant proposition that a breach of the contractual duty of good faith and fair dealing could support the recovery of consequential contract damages in the form of expenses, including fees, incurred to mitigate damages in a separate but related contract lawsuit. In this case, unlike *Microsoft*, there is no contract claim. Further, the *Microsoft* case arose in the context of federal court patent litigation, involving a specialized agreement requiring licensing of certain patents “on reasonable and non-discriminatory (‘RAND’) terms.” 795 F.3d at 1029. Patent claims are a context in which federal statutes have long provided a statutory exception to the American Rule. See 35 U.S.C. § 285 (providing “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing

party”). In this legal malpractice case, there is no such statutory backdrop. Finally, the Ninth Circuit found the context of the litigation was analogous to circumstances, such as an insurance claim, that present an exception to the American Rule under Washington law. 795 F.3d at 1049-52. None of these factors is present here; the American Rule applies in full. *See Schmidt v. Coogan*, 181 Wn.2d 661, 678, 335 P.3d 424 (2014) (reaffirming that American Rule applies to legal malpractice cases).

Nothing in *Microsoft* establishes that the American Rule is limited to same-suit attorney fee claims. The court did not discuss *McCready*, *Lovell*, or any other Washington authority on the subject. Instead, the Court simply noted that the fees at issue were incurred in a separate lawsuit, and then discussed the numerous other factors justifying the award at issue. The Ninth Circuit did not, and could not, abrogate decades of established Washington law. *See, e.g., In re Detention of D.F.F.*, 172 Wn.2d 37, 43 n.6, 256 P.3d 357 (2011) (noting the Court does not “rely on the Ninth Circuit to determine state law issues”).

The Trustees next complain that application of the American Rule prevents an injured party from being made whole. *See* Br. of Apps. at 15-19. In some sense, that is true in virtually all litigation. Under the American Rule, plaintiffs ordinarily do not recover the attorney fees they expended to obtain their judgment. The broad application of the American

Rule in Washington and elsewhere reflects that the numerous important purposes of the American Rule outweigh this concern. The consequence, as courts have recognized, is that injured parties are frequently not “made whole.” See, e.g., *Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994) (noting American Rule applies notwithstanding goal of making “the injured party as whole as possible”); *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 725, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982) (noting that the argument that fees should be awarded to make an injured party whole is “nothing more than a restatement of one of the oft-repeated criticisms of the American Rule” (internal marks omitted)).

The Trustees also rely on this Court’s inapposite decision in *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010). *Shoemake* merely addressed the calculation of malpractice damages from a delayed settlement. The Court refused to deduct the negligent attorney’s hypothetical contingent fee from an award of compensatory damages. *Id.* at 201. There was no award of litigation fees and expenses at issue and thus no need to apply the American Rule. In fact, the *Shoemake* Court explicitly stated it was not addressing whether attorney fees could be recovered as damages. *Id.* at 200 n.2. Further, the Court’s refusal to deduct a hypothetical contingent fee was based in part

on the fact that the injured clients had paid for “a second lawyer in order to finish the job,” and those fees were neither sought nor awarded. *Id.* at 201. Nothing in *Shoemake* calls into question the continuing viability of the American Rule in Washington.

The Trustees next argue that the rule does not apply to various “fees and costs” from the Oregon litigation that were “incurred by Fred Jr.’s children, by Susan’s children, and even certain fees and costs incurred by Fred III,” because these “were not Plaintiffs’ own attorneys’ fees and costs.” Br. of Apps. at 43-44. For two reasons, this argument also lacks legal merit.

First, the American Rule applies to all awards of litigation expenses, absent some recognized exception. This includes the fees and costs of another party, in addition to one’s own. *See Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 523, 782 P.2d 597 (1986) (absent exception allowing it, court cannot award the fees “of [a] third person with whom the wronged party is drawn into litigation and for which the wronged party may be held liable”). If anything, that a person who incurred fees is not a party to the present litigation further removes the situation from potential application of the ABC Rule, the one potential exception to the American Rule relied upon by the Trustees. *See infra* at

21-23. The Trustees cite no authority in support of their argument to the contrary. *See* Br. of Apps. at 43.

Second, the Trustees raise this argument for the first time on appeal. Accordingly, the argument has been waived and should not be considered. *See* RAP 9.12 (“On review of an order granting . . . summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”); *cf., e.g., 1519-1525 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932 & n.12, 6 P.3d 74 (2000) (refusing to consider argument that particular details of party’s conduct fell “outside the [] scope” of relevant statute because same argument “was not made to the trial court”); *Vernon v. Acres Allvest, LLC*, 183 Wn. App. 422, 436, 333 P.3d 534 (2014) (argument that party “should be considered a minor . . . because of his cognitive disabilities” was raised “for the first time on appeal” and thus not to be considered).

Finally, the Trustees assert the American Rule does not apply to certain accounting expenses from the Oregon trust litigation, because those expenses “were not the mere product of litigation.” Br. of Apps. at 43 (emphasis added). But, as explained above, the American Rule applies to all litigation expenses, regardless of any tangential motivations or reasons for those expenses. Moreover, accounting costs incurred in furtherance of litigation qualify as litigation expenses for purposes of the

rule, and absent an exception, may not be imposed on a separate party—especially a party that did not participate in the litigation and had no involvement with the accounting. *See Wagner*, 128 Wn.2d at 417-18 (accounting fees in litigation cannot be imposed on a party except when court orders and directs the accounting for the benefit of that party). Susan and Fred III jointly agreed to incur these costs as part of the litigation between them. *See CP 529*. In any case, this argument is new on appeal and should be disregarded for that reason alone. RAP 9.12.

In sum, all of the Trustees’ arguments against the application of the American Rule in this case are meritless and should be rejected. Absent a recognized exception to the rule, the Trustees are not entitled to an award of litigation expenses.

2. No recognized exception applies in this case that would allow an award of litigation expenses.

The Trustees rely on only one exception to the American Rule that in limited circumstances allows for the award of fees incurred in certain litigation with a “third person.” *McCready*, 131 Wn.2d at 275. As the Trustees themselves acknowledge, however, they fail to meet the requirements to invoke this exception.

In Washington, the exception to the American Rule for third-party litigation expenses is known by various names, including “equitable

indemnity,” *Brock v. Tarrant*, 57 Wn. App. 562, 571, 789 P.2d 112 (1990), the “ABC Rule,” *Lyzanchuk v. Yakima Ranches Owners Ass’n, Phase II, Inc.*, 73 Wn. App. 1, 10, 866 P.2d 695 (1994), the “consequential damages exception,” *Barnett v. Buchan Baking Co.*, 108 Wn.2d 405, 409, 738 P.2d 1056 (1987), and the doctrine of “common law indemnity,” *Stolz v. McKowen*, 14 Wn. App. 808, 812, 545 P.2d 584 (1976). Though the labels vary, this equitable indemnity exception or ABC Rule has been applied consistently in Washington for decades.

For the equitable indemnity exception to apply, three conditions must be met. *See, e.g., Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 758, 649 P.2d 828 (1982). First, the defendant (the party against whom fees are sought) must have committed a “wrongful act or omission . . . toward” the plaintiff (the party seeking fees). *Id.* Second, such act must have “expose[d] or involve[d]” plaintiff in litigation with a third party. *Id.* More specifically, the wrongful act must have been the sole proximate cause of the third-party litigation. *See, e.g., Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 127-28, 857 P.2d 1053 (1993). Finally, the third party must not have been “connected with the initial transaction or event” involving defendant’s wrongful act. *Haner*, 97 Wn.2d at 758; *Armstrong*, 64 Wn.2d at 195-96. Here, the Trustees have failed as a matter of law to show that Dorsey was the sole cause of an extended bitter

fight between co-trustees that continued long after Dorsey's involvement ended or that the co-trustees were disconnected from Dorsey's relevant work, thus precluding application of the exception.

First, the Trustees cannot show that Dorsey's work was the "sole" cause of the Oregon litigation. The sole causation requirement narrows the scope of the equitable indemnity exception and enforces the fundamental principle that a party invoking equity must have "clean hands." *J. L. Cooper & Co. v. Anchor Secs. Co.*, 9 Wn.2d 45, 71-72, 113 P.2d 845 (1941). The Trustees do not object to this requirement. Indeed, the Trustees do not even mention it in their briefing.

The Oregon trial court decision establishes that both Susan and Fred III bore significant responsibility for the trust litigation. *See* CP 800-12. The court specifically ruled that Fred III had "ignored his duty of loyalty," failed to stay sufficiently informed, acted unreasonably in negotiations, and "inflated" the dispute between him and Susan. CP 801, 805, 809. The court also found that Susan had failed to act "as a careful fiduciary," mismanaging trust accounts and failing to communicate, among other "remarkable" and wrongful behavior. CP 805.

The Trustees do not dispute that Susan and Fred III were causes of the Oregon litigation and resulting expense. Nor could they, as a matter of judicial and collateral estoppel. Under the doctrine of judicial estoppel, a

party is precluded “from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). In the Oregon litigation, in order to advance their respective positions, Susan and Fred III as co-trustees each argued that the other had engaged in wrongful conduct that led to the litigation. CP 669-70, 681. The Trustees, including Susan, cannot prevail in a prior proceeding with one position, and now take an inconsistent position to gain an advantage in these subsequent proceedings.

Likewise, under the doctrine of collateral estoppel, a party is precluded from relitigating an issue finally determined in a prior action in which it participated. *See State v. Mullin-Coston*, 152 Wn.2d 107, 113-14, 95 P.3d 321 (2004). The Trustees participated in the Oregon litigation, and the fault of both Susan and Fred III was conclusively determined in that action. The Trustees cannot relitigate that issue now.

The Trustees’ arguments about the applicability of estoppel here miss the point. *See* Br. of Apps. at 45-48. In particular, the Trustees discuss whether they are estopped from “asserting that [Dorsey] proximately caused them to incur litigation expenses.” Br. of Apps. at 45. Although Dorsey disputes it caused the Trustees to incur litigation expenses, Dorsey is not claiming estoppel on that distinct issue. What the

Trustees are now estopped from disputing is that the wrongful conduct of Susan and Fred III played a significant role in causing the Oregon litigation. This precludes the Trustees from showing sole causation, which alone precludes equitable indemnity here.

The Trustees also cannot demonstrate that Susan and Fred III were sufficiently separated from Dorsey's legal work to invoke the equitable indemnity exception, an independent reason why equitable indemnity does not apply. Here, both Susan and Fred III were deeply involved with and even contributed to Dorsey's work, prior to litigating their trust disputes. CP 79-80, ¶ 6. They asked Dorsey for assistance effectuating Fred Jr.'s intent, requested that Dorsey prepare the necessary paperwork, and provided input during the drafting process. *Id.* Likewise, both were actively involved with Dorsey's later accounting, including Susan's provision of incomplete records. CP 83-84. In such circumstances, Susan and Fred III were precluded from aggressively litigating with each other to serve their own interests, and then demanding payment from Dorsey for the hundreds of thousands of dollars incurred.

In sum, under well-established Washington law, the Trustees do not qualify for the equitable indemnity exception to the American Rule. Dorsey was not the sole cause of the Oregon litigation, and both Susan and

Fred III were deeply involved with Dorsey's work. The trial court was thus correct to grant summary judgment to Dorsey.

3. The equitable indemnity exception should not be expanded in the context of legal malpractice or other tort cases.

The equitable indemnity exception to the American Rule is well-established and narrow under Washington law. As explained above, the exception does not apply in this case. The American Rule thus precludes the Trustees' requested relief. To avoid this result, the Trustees erroneously suggest that Washington's approach to equitable indemnity is anomalous, and then argue for fee-shifting in any attorney malpractice case. They also urge that the requirement of third-party independence not be applied in tort cases. The Court should decline these requests to substantially change existing law.

At the outset, the Trustees' request for expansion of equitable indemnity in the legal malpractice context runs contrary to the general principle that exceptions to the American Rule are to be construed and applied narrowly. *See Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Rev. Bd.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006) (noting exception to the American Rule "must be narrowly construed" so it does not "swallow the rule"); *see also, e.g., Hecomovich v. Nielsen*, 10 Wn.

App. 563, 573, 518 P.2d 1081 (1974) (noting equitable indemnity is a “narrow exception”).

The Trustees suggest that Washington’s restrictive approach to equitable indemnity is an outlier, but that is incorrect. *See* Br. of Apps. at 1, 3, 31. In truth, approaches to equitable indemnity vary widely among the states. Some states are less restrictive than Washington, as the Trustees point out. *See* Br. of Apps. at 28 n.5 (citing cases); *see, e.g., Uyemura v. Wick*, 551 P.2d 171, 176 (Haw. 1976) (allowing equitable indemnity for any third-party litigation expenses that are “the natural and necessary consequences of the defendant’s act” (internal quotations omitted)). But the Trustees fail to mention that many states take approaches far more restrictive than Washington’s, or approaches very similar to Washington’s, in furtherance of the American Rule:

- At least one state has rejected equitable indemnity outright. *See Jean-Pierre v. Plantation Homes of Crittenden Cnty., Inc.*, 350 Ark. 569, 578, 89 S.W.3d 337 (2002).
- Many states require extraordinary circumstances such as harassment or fraud. *See Taylor*, 130 Ariz. at 523 (requiring “that the defendants acted vexatiously, wantonly, or for oppressive reasons”); *Jacobsen*, 351 Mont. at 470 (exception limited to party being “forced into a frivolous lawsuit”); *Estate of Kriefall*, 342 Wis.2d at 70-71 & n.16 (requiring “wrongful act” that is more than negligence and “similar to fraud,” and noting breach of fiduciary duty “may not always be sufficient”).
- Some limit equitable indemnity to contract actions rather than torts. *See McQueen*, 298 P.3d at 675 (“[T]his exception requires

that damages result from a *breach of a contract*.” (emphasis in original)).

- Some, like Washington, bar equitable indemnity in cases involving other causes. *See Jacobsen*, 351 Mont. at 470 (keeping doctrine “confined” to litigation for which plaintiff had “no fault”); *McQueen*, 298 P.3d at 675 (noting doctrine does not apply if there was a “subsequent wrongful act”).
- Some, again like Washington, require that the third party be disconnected from the defendant’s allegedly wrongful conduct. *See Wright v. Bhd. Bank & Trust Co.*, 14 Kan. App. 2d 71, 75-76, 782 P.2d 70 (1989) (citing *Armstrong*); *Albright v. Fish*, 138 Vt. 585, 591, 422 A.2d 250 (1980) (same).<sup>1</sup>

Particularly when viewed among the range of authorities above, Washington’s longstanding approach to equitable indemnity is both reasonable and comparable to the approaches of other states. The Trustees’ suggestion that Washington stands alone in imposing limits on equitable indemnity is inaccurate.

The Trustees nonetheless rely on that premise to urge recovery of third-party attorney fees and other litigation expenses in all cases of legal malpractice. *See Br. of Apps.* at 29-32. But as this Court recently observed, “[a]ttorney fees are not awarded to plaintiffs in other tort cases, including other forms of malpractice,” and it “would be anomalous to award attorney fees in this context but not in other tort cases.” *Schmidt*, 181 Wn.2d at 678. Indeed, the Trustees have not pointed to a single

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<sup>1</sup> The Trustees argue about the particular facts of these cases, but they are cited here for the relevant rules that these states have adopted, not the application of those rules to particular fact patterns. *See Br. of Apps.* at 31-32.

jurisdiction that treats legal malpractice differently than other torts for purposes of the American Rule and its narrow exceptions. This Court's recent holding in *Schmidt* should be reaffirmed to resolve the Trustees' request here.

The Trustees are also wrong when they assert that the American Rule treats attorneys differently from other professionals (such as doctors or accountants) accused of malpractice. *See* Br. of Apps. at 1, 15-16. Regardless of the type of professional, the governing principles remain the same, and successful plaintiffs do not recover their attorney fees. *Compare Kelly v. Foster*, 62 Wn. App. 150, 153-55, 813 P.2d 598 (1991) (holding attorney's client was not entitled to fee award in addition to damages for malpractice), *with Burns v. McClinton*, 135 Wn. App. 285, 291-92, 306, 308-11, 143 P.3d 630 (2006) (reversing fee award against accountant but upholding compensation award for overcharges). As the Court observed in *Schmidt*, it would be unwarranted for attorney fees to be awarded in legal malpractice cases alone, as the Trustees are requesting.

Contrary to the Trustees' argument, litigation is not in and of itself a "corrective" measure that normally qualifies as a compensable form of damages, whether in the context of legal malpractice or otherwise. Br. of Apps. at 1. The Trustees are correct that the costs of corrective medical care or the work of a second accountant to fix a tax return might be

compensable. *See id.* Likewise, the costs of hiring a second attorney to revise a faulty legal document might be recoverable. Under the American Rule, however, the costs of hiring an attorney to litigate disputes resulting from alleged professional malpractice—whether medical, legal, or otherwise—are appropriately treated differently. There is a substantive distinction between the costs of hiring a second attorney to re-do a negligently drafted contract, and the costs of litigating over such a contract. The same is true, for example, regarding the costs of hiring a second accountant for purposes of litigation, rather than to correct a tax return. *See, e.g., Fiorito v. Goerig*, 27 Wn.2d 615, 619, 179 P.2d 316 (1947) (holding accountant fees incurred in litigation non-recoverable under the American Rule). Litigation costs are not recoverable absent a recognized exception to the American Rule.

The request for expansion in legal malpractice cases also ignores the important role of the Legislature in this context. The “allowance of attorney fees . . . creates a substantive right” and is thus legislative in nature. *Penn. Life Ins. Co. v. Emp’t Sec. Dep’t*, 97 Wn.2d 412, 414, 645 P.2d 693 (1982); *see also Leslie v. Verhey*, 90 Wn. App. 796, 806, 954 P.2d 330 (1998). The Legislature has adopted many statutes to govern awards of litigation expenses. *See* 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 37:13 (2d ed. 2009) (citing statutes). This

includes a statute addressing medical, as opposed to legal, malpractice cases. *See* RCW 7.70.070.

In light of the Legislature's occupation of this area of the law, and the longstanding and historical nature of the equitable exceptions to the American Rule, this Court has held that going forward, it is for the Legislature and "not the judiciary" to "fashion exceptions to the 'American Rule'" on litigation expenses. *Blue Sky*, 107 Wn.2d at 121; *see also Penn. Life*, 97 Wn.2d at 417 (noting party seeking equitable award of fees must qualify under a "doctrine heretofore recognized"). The Legislature has opted not to expand the equitable indemnity exception as applied to attorney malpractice litigation.

The Trustees' related request to abandon the third-party independence requirement in tort cases as opposed to contractual disputes is no more persuasive. *See* Br. of Apps. at 23-29. In the first place, even if the Court were inclined to examine this change, it would not affect the result here because the Trustees still fail to meet the requirement of sole causation. In any event, the longstanding requirement of independence is appropriate in tort cases, especially tort cases involving interrelated parties with mutual liability or cross-claims. *See* Ans. to Stmt. of Grounds for Dir. Rev. at 8.

The Trustees call into question the purposes of the independence requirement on four grounds, none of which is valid. First, the Trustees point to a statute governing joint and several liability among tortfeasors, which establishes “a right of contribution” among tortfeasors for liability on “the same indivisible claim for the same injury . . . .” RCW 4.22.040(1). This statute only addresses contribution claims—it does not preclude an injured party from bringing a separate claim for fees against one of multiple liable parties. Only the American Rule does that, in combination with the independence requirement for equitable indemnity.

Second, the Trustees argue that litigation among parties with cross-claims “has nothing to do with this case . . . .” Br. of Apps. at 34. This disregards the facts of this case. Here, Susan and Fred III aggressively litigated claims against one another for breach of fiduciary duties. The Trustees are now seeking to recoup from Dorsey, based on related claims, the fees incurred in that litigation. This is precisely the type of fee request the independence requirement is designed to preclude.

Third, the Trustees urge that only “fees that were *reasonably* incurred” would ever be awarded. Br. of Apps. at 34 (emphasis in original). This ignores that the American Rule and independence requirement are concerned with the “danger of abuse” and risk of “animated and protracted” disputes in this context, and the corresponding

need to avoid any litigation over fees. *Oelrichs*, 82 U.S. at 231. These concerns apply notwithstanding any given party's assurances that the fees they seek were incurred reasonably.

Fourth, the Trustees argue that the need to avoid protracted fee litigation is insufficient "to sustain" the independence requirement, because otherwise Washington courts "would *never* allow parties to recover attorney fees." Br. of Apps. at 35 (emphasis in original). The Trustees fail to appreciate the relationship between the American Rule and its narrow equitable exceptions. In particular, these exceptions are intended to allow fee awards when the equities favoring such awards are at their greatest and the reasons for the American Rule have the least force. In cases of interrelated as compared to disconnected parties, the equities will be less favorable, and the need to avoid protracted fee litigation will be greater, meaning the exception should not apply. In sum, the independence requirement properly narrows the equitable indemnity exception and furthers the purposes of the American Rule.

Trying to buttress weak policy arguments with history, the Trustees assert that the independence requirement originated as a principle to govern only contractual disputes, and should be applied that way now. *See* Br. of App. at 26 (discussing *Armstrong*). Again, the Trustees' argument rests on a false premise. In *Armstrong*, the Court expressly

addressed the question of whether attorney fees are recoverable “as consequential damages” for “oversight, negligence, or breach of contract[.]” 64 Wn.2d at 194-95 (emphasis added). In Washington, the requirement was intended and has been applied from its inception to govern both contract and tort cases.

The Court’s additional language in *Armstrong* further confirms that the rule was intended to apply to tort as well as contract cases. The Court specifically explained that “where the acts or omissions of a party to an agreement or event have exposed one to litigation . . . by persons not connected with the initial transaction or event—the allowance of attorney’s fees may be a proper element of consequential damages.” *Id.* at 195 (emphases added). The Court then cited to prior precedent involving negligence (an “abstracter’s error”) and reiterated that the “fulcrum” of the doctrine is “whether the action . . . is brought or defended by third persons . . . not privy to the contract, agreement, or events through which the litigation arises.” *Armstrong*, 64 Wn.2d at 195-96 (emphasis added). The independence requirement was intended to apply in tort.<sup>2</sup>

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<sup>2</sup> Limiting the independence requirement from *Armstrong* to contract cases would suggest the doctrine of equitable indemnity itself is limited to contract rather than tort cases. Indeed, at least one state has taken this approach. *See McQueen*, 298 P.3d at 675. In that instance, the Trustees would still not be entitled to an award of litigation expenses.

The Trustees attempt to discount the actual language of *Armstrong* by asserting that the contractual and tort claims at issue in that case “were essentially coextensive” under Washington’s former “economic loss rule.” Br. of Apps. at 26 n.3. Even assuming this to be true in all cases, it does not explain why the Court expressly stated the rule in terms of both contract and tort. As discussed above, the Court framed the independence requirement in broad terms because the underlying purposes being served apply to both contract and tort cases, especially cases involving parties with mutual liability or cross-claims.

This Court also very recently in *LK Operating* confirmed the historical scope of equitable indemnity and the independence requirement. In particular, the Court applied these doctrines, as a matter of course, to a tort claim for legal malpractice. *See* 181 Wn.2d at 125-26. In doing so, the Court rejected one party’s argument for a “new or modified” approach, refusing to address the merits of that request because the argument was “raised for the first time on appeal.” *Id.* at 126. Nothing in the Court’s opinion invited re-visitation of that issue, and there is no basis for modifying the equitable indemnity exception in this case.

The Trustees distort this Court’s requirements for overruling existing precedent, which have not been met here. To “abandon established precedent, there must be a clear showing that an established

rule is incorrect and harmful.” *Fergen v. Sestero*, 182 Wn.2d 794, 809, 346 P.3d 708 (2015) (internal quotations omitted). Here, the Trustees have failed to show either element. First, as explained above, the equitable indemnity exception and independence requirement are both correct, based on longstanding precedent and as a matter of policy. Second, neither rule is harmful. To the contrary, both doctrines effectively further the important purposes of the American Rule while allowing for fee-shifting only in a narrow class of the most compelling cases where (unlike here) the equities support such a result.

The Trustees argue there has been no reliance here, but that is not the test. *See* Br. of App. at 35-36. In any case, the Trustees are wrong, because the American Rule and the narrow exception for equitable indemnity have consistently governed tort cases in Washington for decades. That includes the specific context of legal malpractice. *See, e.g., Flint v. Hart*, 82 Wn. App. 209, 224, 917 P.2d 590 (1996). And that is why this Court applied the doctrines as a matter of course in *LK Operating*. Parties rely on such longstanding principles to guide their affairs before, during, and after litigation, and such principles should not be overturned lightly or without justification, as here.

The Trustees also argue that *stare decisis* is more restrictive as applied to statutory interpretations. *See* Br. of Apps. at 36. Again, this is

not the test. Regardless, the very reason behind heightened scrutiny for statutory interpretations is that “the legislative branch is free to clarify its intent by altering the statute if it sees fit.” *Id.* (quoting *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 352, 217 P.3d 1172 (2009) (Korsmo, J., concurring)). As discussed above, the Legislature has occupied the area of fee-shifting, and this Court has deferred to the Legislature to make any needed changes to existing rules in this context.

In the end, the American Rule precludes any award of litigation expenses absent a recognized exception. No recognized exception applies here. And the Court should not expand the equitable indemnity exception to award litigation expenses in this case, where both parties to the underlying litigation have already been adjudicated to bear responsibility and fault for the expenditure of fees. As a matter of law, the Trustees are not entitled to any relief here. The trial court’s grant of summary judgment was proper on this basis.

**B. The Trustees are not entitled to disgorgement of fees paid to Dorsey.**

The Trustees now attempt to sidestep the American Rule by asserting that Dorsey should disgorge all of its fees based on alleged violations of the Rules of Professional Conduct. *See* Br. of Apps. at 40-42. This claim fails for multiple reasons. First, the Trustees never

advanced this argument at the trial court and failed to cite it as an issue for direct review. Second, the argument now advanced on appeal relates exclusively to conduct occurring in 2002 and is barred under the applicable statute of limitations. The Trustees cannot assert such a claim now. Finally, the duty that Dorsey allegedly breached was owed to Susan as an individual, not as a trustee or a beneficiary, before the Trust was created. Although Susan was initially a plaintiff in this case in her individual capacity, those claims were dropped, consistent with Dorsey's showing that it fully disclosed any potential conflict to Susan. For each of these reasons, the Trustees' claim for disgorgement was properly dismissed.

1. The Trustees have abandoned their claim for disgorgement.

The Court should not reach the Trustees' disgorgement claim, because they abandoned any request for disgorgement in this case. Before the trial court, in opposition to Dorsey's motion for summary judgment on all claims, the Trustees did not argue a breach of the RPCs. And on appeal, in their Statement of Grounds for Direct Review, the Trustees did not raise the issue. The Trustees should not be permitted to craft an entirely new argument in their appeal brief based on alleged violations of the RPCs when no prior briefing or record supports that argument.

On review of an order granting or denying summary judgment, appellate courts consider “only evidence and issues called to the attention of the trial court.” RAP 9.12. Accordingly, “a plaintiff abandons a claim asserted in a complaint by failing to address the claim in opposition pleadings . . . in response to a summary judgment motion seeking dismissal of the entire complaint.” *West v. Gregoire*, 184 Wn. App. 164, 336 P.3d 110, 113 (2014).

Here, Dorsey moved for summary judgment on all claims “in their entirety.” CP 72. In response, the Trustees’ only argument was that Dorsey’s alleged negligence proximately caused the Oregon trust litigation. CP 224-26. But malpractice is distinct from violations of the RPCs. *See Hizey v. Carpenter*, 119 Wn.2d 251, 261-65, 830 P.2d 646 (1992). The Trustees made no mention of alleged violations of the RPCs before the trial court, whether in their complaint, summary judgment briefing, or at oral argument. *See* CP 1-8, 234; VRP (Feb. 6, 2015) at 22:21-23:11. Further, the Trustees’ opposition brief included only two sentences referencing disgorgement, wrongly suggesting Dorsey had “not brought this issue in [its] summary judgment motion . . . .” CP 234. Such “passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996). Because the Trustees did not argue their claim for

disgorgement at the trial court, they cannot do so now on appeal. *See West*, 336 P.3d at 113.

The Trustees similarly omitted their disgorgement claim from their Statement of Grounds for Direct Review to this Court. In arguing why direct review in this Court was warranted, the Trustees framed their appeal as presenting only one question, namely, whether this Court should “reconsider the ABC Rule” as applied to legal malpractice cases. Stmt. of Grounds at 8. RAP 4.2(c) required the Trustees to list in their Statement of Grounds “[a] statement of each issue the party intends to present for review.” As in their summary judgment briefing below, the Trustees solely raised the issue that Dorsey’s alleged malpractice proximately caused the Oregon trust litigation. Again, this issue has nothing to do with disgorgement or alleged RPC violations. *Hizey*, 119 Wn.2d at 263-65.

In sum, the Trustees have failed to brief or argue a claim for disgorgement based on alleged violations of the RPCs. They cannot present that claim in the first instance to this Court in order to circumvent the trial court’s decision.

2. The Trustees’ claim for disgorgement is untimely.

The Trustees’ claim for disgorgement is also barred by the applicable statute of limitations. The limitations period for a breach of fiduciary duty claim (the basis for the disgorgement sought here) is three

years. See RCW 4.16.080(3); *Hudson v. Condon*, 101 Wn. App. 866, 872-73, 6 P.3d 615 (2000). The Trustees filed their complaint in 2012, but are arguing for disgorgement based solely on Dorsey's 2002 work establishing the Trust. See Br. of Apps. at 40-42. Accordingly, the Trustees' breach of fiduciary duty claim and corresponding request for disgorgement of fees are barred by the statute of limitations.<sup>3</sup>

The Trustees point to the "continuous representation" doctrine, but that doctrine cannot resurrect expired claims long after the facts at issue occurred. Br. of App. at 48-49. In legal malpractice cases, the doctrine of continuous representation tolls the statute of limitations "only during the lawyer's representation of the client in the *same matter* from which the malpractice claim arose." *Janicki Logging & Construction Co., Inc. v. Schwabe, Williamson, & Wyatt, P.C.*, 109 Wn. App. 655, 663-64, 37 P.3d 309 (2001) (emphasis in original). The doctrine does not toll the limitations period all the way "until the end of the attorney-client *relationship . . .*" *Id.* (emphasis in original).

As a result, Washington courts have refused to apply the continuous representation doctrine to distinct matters undertaken at different times, notwithstanding a continuous attorney-client relationship

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<sup>3</sup> The Trustees' malpractice claim for work undertaken by Dorsey in 2002 similarly is time-barred. *French v. Gabriel*, 116 Wn.2d 584, 595, 806 P.2d 1234 (1991) (three-year statute of limitations for attorney malpractice claims).

and similar overall subject matter. See *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 819-20, 120 P.3d 605 (2005) (doctrine did not apply to real estate work completed in 1999 and separate estate planning work undertaken in 2000); *Burns*, 135 Wn. App. at 294 (continuous representation rule is limited to “a particular matter”).

Here, the undisputed record evidence shows Dorsey’s work related to the 2002 establishment of the Trust was complete by May 2007 at the latest, when Dorsey sent the final invoice in that matter to the personal representatives of the estate. CP 196-98. Dorsey did not handle day-to-day administration, was not involved in the accounting of the Trust, and had no Trust account statements or other accounting records. CP 81, ¶ 9.

Dorsey’s work on the 2008 reconciliation was a new and distinct matter. That work was undertaken for the Trust only after Fred III contacted Dorsey in September 2008 in the wake of his unsuccessful efforts to obtain from Susan, his co-trustee, an accounting of the “inflows and outflows” of funds from the Trust. CP 83, ¶ 12, CP 200. Dorsey opened a new matter number for work related to the Trust reconciliation on October 7, 2008. CP 83, ¶ 12, CP 203.

The Trustees claim Washington case law supports their position, but they rely solely on a New York case, *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 252 A.D.2d 179 (N.Y. App. Div. 1998), which is

inapposite here. In *Ackerman*, the court applied the continuous representation doctrine to an accounting firm's continuing preparation of specific yearly tax documents. 683 N.Y.S.2d at 184, 205. The firm had been engaged specifically "to render annual accounting services" and in particular to prepare the forms in question each year. *Id.* at 184. This was, in other words, a straightforward application of the continuous representation doctrine to a firm's continuous representation of a client in the same matter. *See id.* at 205.

Here, in contrast, the undisputed facts as to Dorsey's representation of the estate and the Trust demonstrate that the continuous representation doctrine is inapplicable to toll the limitations period. Dorsey's work was undertaken on two distinct matters during two distinct time periods. As a matter of law, the Trustees' fiduciary duty claim and fee disgorgement request arising out of Dorsey's work in 2002 are time-barred and were properly dismissed. *See Cawdrey*, 129 Wn. App. at 819.

3. The Trustees are precluded from disgorging fees based on the alleged breach of a duty not owed to the Trust.

Even if the Trustees had timely brought their claim for disgorgement and preserved it before the trial court, dismissal of that claim still would have been warranted. The Trustees seek to disgorge fees the Trust paid for "Trust work," CP 33, but based on the alleged breach of

a duty that was owed to Susan in her individual capacity, before the Trust was even created. Susan was initially a party to this case in her individual capacity, but was eventually dismissed in that capacity. The Trustees cannot obtain disgorgement based on the alleged breach of a duty that was owed to Susan individually and not owed to the Trust.

The Trustees are arguing for disgorgement based entirely on Dorsey's conduct before the Trust was created. *See* Br. of Apps. at 40-42. In particular, the Trustees argue that Dorsey failed to provide Susan with sufficient disclosures, such as the disclosure of a potential conflict of interest between her and Fred III, "before drafting the new Trust agreement in 2002." Br. of Apps. at 41-42. The duty allegedly breached was thus owed to Susan in her individual capacity, not in her capacity as a trustee or even as a beneficiary of a trust that had not yet been created.

In this case, Susan is no longer a party in her individual capacity, and is acting solely as a trustee. When the Trustees' complaint was initially filed, Susan was included in her individual capacity as a plaintiff. *See* CP 1. But the Trustees eventually moved for voluntary dismissal of Susan in that capacity, and the motion was granted. CP 18-20. This was consistent with Dorsey's showing that it provided sufficient disclosures to Susan at the outset. In a 2002 letter to both Susan and Fred III, for

example, Dorsey expressly identified the potential for a conflict of interest as follows:

It is important for Susan to consider whether to file a claim against the estate for repayment of her funds used to pay Fred's creditors. This presents something of a conflict of interest issue since such a claim would reduce the value of the estate. . . . It is important to understand that all communication between a lawyer and client is privileged and not subject to discovery in any legal proceeding, but anything either of you says to me is information that I must disclose to the other if requested. Obviously, it may be wise for you to retain independent counsel to advise you about any claim you may have. Please do not hesitate to ask questions to clarify this.

CP 80-81, 161.<sup>4</sup> To whatever extent Susan found this and other disclosures insufficient, she could have remained in the case as an individual and pursued those claims.

The Trustees cannot obtain disgorgement based on the alleged breach of a duty owed to Susan in her individual capacity before the Trust was created. As the Trustees recognize, it is the “client whose attorney has breached a fiduciary duty” who “may be entitled to disgorgement of attorney fees . . . .” Br. of Apps. at 42 (emphasis added, quoting WPI 107.10). Only the “client” to whom the breached duty was owed may seek “to recover” the fees paid. *Behnke v. Ahrens*, 172 Wn. App. 281,

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<sup>4</sup> Dorsey also reiterated the potential for a conflict of interest in 2008 when Susan and Fred III were acting as co-trustees. See CP 83, 208.

297, 294 P.3d 729 (2012). This claim fails as a matter of law and was rightly dismissed.

**C. The Trustees' repeated failure to segregate damages further precludes their requested relief.**

The Trustees overlook an additional, independent reason why dismissal of their claims was proper in this case. In particular, the Trustees repeatedly failed to provide evidence for segregating any damages attributable to Dorsey. As explained below, the Trustees have demanded that Dorsey pay for all their litigation expenses, and return fees paid for a variety of work, without any evidence to establish the portion of such expenses or fees for which Dorsey actually may be liable. Dorsey repeatedly objected to the lack of needed segregation evidence on summary judgment, but the Trustees failed to respond. This alone warranted the trial court's dismissal of all claims.

A plaintiff is required to provide segregation evidence whenever necessary to demonstrate the extent and amount of a defendant's liability. To obtain monetary relief in particular, a plaintiff must present "some data from which the trier of fact can with reasonable certainty determine the amount" to be paid. *Wappenstein v. Shrepel*, 19 Wn.2d 371, 375, 142 P.2d 897 (1943). In cases involving "loss resulting from various causes," the plaintiff must also present specific "evidence of the portion" of the loss

“for which the defendant may be liable . . . .” *Id.* (emphasis added). Notwithstanding any “difficulty of making such a showing” in a given case, the burden remains on the plaintiff to present such evidence. *Maas v. Perkins*, 42 Wn.2d 38, 43, 253 P.2d 427 (1953). In all, the plaintiff’s evidence must allow for the segregation and assignment of damages based on more than “speculation and conjecture upon that subject.” *Wappenstein*, 19 Wn.2d at 375.

If a plaintiff fails to provide evidence to distinguish among various distinct sources of loss, then damages will be “too uncertain” and the plaintiff’s claims will fail. *Id.* On numerous occasions, Washington courts have dismissed claims due to a lack of such segregation evidence. *See, e.g., id.* at 374-75 (no “proof of what proportion of [hospital] charges related to one ailment or another”); *Maas*, 42 Wn.2d at 41-43 (no testimony that particular defendant was responsible for any “specified amount of monetary damage” when varied parties had contributed to ongoing pollution); *Hufford v. Cicovich*, 47 Wn.2d 905, 909-10, 290 P.2d 709 (1955) (no evidence for segregating damage from two distinct fires when defendant was liable for only one).

In Dorsey’s motion for summary judgment, Dorsey pointed out that the Trustees had failed to provide “evidence that differentiates” among any of the causes of their claimed losses and the specific amounts

that could be attributed to Dorsey's alleged malpractice. CP 65-66. Given the established fault of Susan and Fred III, the need for segregation evidence regarding the Oregon litigation was especially acute. *See Scott v. Rainbow Ambulance Serv., Inc.*, 75 Wn.2d 494, 498, 452 P.2d 220 (1969) (segregation evidence needed where plaintiff contributed to own injuries). Dorsey further pointed out that at least some of the fees it was paid were for work not even alleged to be deficient. *See* CP 66. For example, Dorsey assisted the Trust in 2009 with the sale of a house on Whidbey Island, a transaction the Trustees do not challenge. *See* CP 66, 200, 400. The Trustees were thus obligated to show the specific portions of fees that were related to Dorsey's alleged breach, and the specific amount by which Dorsey's services were purportedly deficient. *See Interlake Porsche*, 45 Wn. App. at 511-13 (vacating damages award for breach of fiduciary duty for lack of segregation because amount sought for improper spending included at least some "legitimate business expenses").

The Trustees failed to present any necessary segregation evidence on summary judgment in response to Dorsey's objections. Dorsey reiterated its objection to the Trustees' lack of segregation evidence in its motion for summary judgment, CP 65-66, again in its reply brief, CP 550, and again at the hearing on its motion, VRP (Feb. 6, 2015) at 14:3-17:6. But in response to Dorsey's repeated objections, the Trustees never

responded or made any showing. *See* CP 222-41; VRP (Feb. 6, 2015) at 17:21-26:19, 32:16-34:5. This warranted dismissal. *See, e.g., Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 222-23 & n.7, 254 P.3d 778 (2011) (noting that when a defendant points out on summary judgment “an absence of [necessary] evidence” the plaintiff must “make a showing” (internal quotations omitted)).

## VI. CONCLUSION

The trial court in the Oregon litigation found that Susan and Fred III violated their duties as co-trustees, resulting in costly litigation to resolve their disputes. Under the American Rule, the Trustees cannot now demand that Dorsey pay for the fees and expenses incurred in that separate litigation. The Court should not change decades of Washington law to create a new recovery in this case. The Court should also reject the Trustees’ attempt to resurrect a claim for disgorgement, as any such claim has been abandoned, is now untimely, and is based on a duty not owed to the Trust. The Trustees also failed to present necessary segregation evidence notwithstanding Dorsey’s repeated objections, which further

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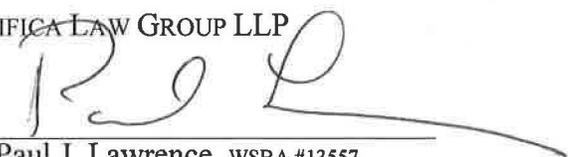
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warranted dismissal of all their claims. For all of these reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of October, 2015.

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